Agents for Respondents—Webster & Sprott, S.S.C., and Campbell & Smith, S.S.C., and J. & A. Peddie, W.S.

Tuesday, November 5.

SECOND DIVISION.

MORRISON *v.* JEFFERIES AND OTHERS.

Written Contract—Extra Work—Triennial Prescription. Held that the plea of the triennial prescription did not apply to extra work executed under a written contract providing for such work.

This is an action at the instance of Alexander Morrison, contractor, Bellevue Terrace, Edinburgh, against Dr Jefferies, Dalkeith, and others, trustees of the Queen's Theatre and Opera House, Edinburgh, concluding for the balance of a sum of money alleged to be due to him for the mason work done by him on the theatre, under a written contract between, May 1854 and May 1856. The pursuer made the following statements in support of his claim :—

"In terms of, and upon the conditions of the said specifications, the pursuer, in or about the end of 1853 or beginning of 1854, give to Mr Bryce, on behalf of the defenders and the said John Brown, as trustees and committee foresaid, an offer, addressed to the latter, for the whole mason work, stating the difference of price between Sterlie Burn and Kenmuir Quarries for the hewn works of principal fronts. There was no time fixed by the specifications for the contractor for the mason work commencing or completing his operations, but the pursuer understood, and made up, and gave in his estimate and offer as aforesaid, on the footing that he was to be at liberty, and not to be prevented by the defenders and the said John Brown, or any of them, or any one for whom they were responsible, from commencing and carrying on continuously, and finishing and completing the mason work of the said building mentioned in the said specifications.

"The estimate and offer so made up and given in was retained by the said David Bryce, and he, in or about the end of 1853 or beginning of 1854, told the pursuer that he was to get the works, and would be told when to commence the same. The pursuer's said estimate and offer were thus accepted by the defenders and the said John Brown; and the pursuer was thus employed by them to commence, carry on, and finish and complete the mason work of the said building. And it was contracted and agreed between the pursuer and the then trustees or committee aforesaid, that the mason work which the pursuer was so employed to commence, carry on, and finish and complete, should be forthwith, or as soon as possible thereafter, commenced and carried on continuously, and be completed to the entire satisfaction of the said trustees or committee, or Mr Bryce, or Mr Hog.

"Shortly previous to 18th May 1854, the pursuer was told by Mr Bryce to prepare to commence the said works, and on or about 18th May 1854 the pursuer got access to the said site, and it was on or about 24th May 1854 that he commenced the said works. The pursuer's works were, however, after being so commenced, carried on continuously (with the exception of the period from 2d to 26th June 1854, during which he was not allowed by the defenders and the said John Brown, as the then trustees or committee, who communicated with the pursuer through the defender Thomas Scott, their clerk or secretary, and whose letter to the pursuer is produced, to proceed, in consequence of their having been served with an interdict), and finished and completed on or about 24th May 1856. The works, under the pursuer's contract, and extra works connected therewith, were completed under his said employment by the defenders, and in every respect to the entire satisfaction and under the instructions of Mr Hog. Mr Bryce was also entirely satisfied with the works completed by the pursuer in every respect. There was in the specifications to which the pursuer's offer referred, a provision as to the entry and signature in a book of all additions to, or deductions from, the works embraced in the specifications, but no book was provided by the defenders or any person for this purpose, and none such was kept, although there were both deductions from, and additions to, said works, and all such were executed by the pursuer under the instructions of Mr Hog or of some of the defenders, and to the entire satisfaction of Mr Hog. Neither the defenders nor Mr Bryce nor Mr Hog ever gave the pursuer any written orders; and from first to last, both as regarded original and extra work, the pursuer proceeded with the works he contracted to execute, and those he was verbally ordered to do, and was in part paid for, as after mentioned, by the defenders, in the full knowledge of the defenders and Mr Bryce and Mr Hog, and without objection on that score of the want of written orders or signed entries in any book therefor, under the instructions and to the entire satisfaction of Mr Hog. The provision in the specifications as to the entry and signature in a book was never acted on, but departed from and abandoned by the defenders and Mr Brown, as the pursuers' employers."

The defender maintained a number of pleas which the Lord Ordinary (BARCAPLE) repelled, holding that averments had not been made relevant to support them, and they pleaded the triennial prescription. His Lordship also repelled the latter plea, on the ground that it was not disputed that the extra work in question was performed under a written contract which provided for extra work being done, and that in such a case the triennial prescription did not apply.

The defenders reclaimed.

SOLICITOR-GENERAL and MAIDMENT for them.

THOMS in answer.

The Court adhered.

Agents for Pursuer—Lindsay & Paterson, W.S.

Agent for Defenders—J. Neilson, S.S.C.

Wednesday, November 6.

FIRST DIVISION.

MARQUIS OF AILSA *v.* PATERSON AND RONALD.

Property—River—Salmon-Fishing—1696, *c.* 33—*Prescription—Mill-dam.* In an action between A, proprietor of salmon-fishings and one bank of a river, and B, proprietor of opposite bank, *Held* that B had a prescriptive right to a dam-dyke across the river, but with a sufficient slap for the passage of salmon. Nature and dimensions of slap adjusted in accordance with report by engineer to whom remit made by Court.

The Marquis of Ailsa brought this action against Mr Paterson of Paterson and his tenant in the New Mill of Monkwood, in the parish of Maybole, asking to have it found, *inter alia*, that the defenders were not entitled to erect or maintain a dam-dyke across the bed of the river Doon in any respect different from that possessed by them prior to 1st May 1859, or to extend or alter the dam-dyke in any way so as to obstruct or alter the course of the river, or the pursuer's right of trout and salmon-fishing. The summons also concluded for removal of an addition which had been made by the defenders to the dam-dyke, and for damages. Otherwise, in the event of the defenders being found to have a right to maintain a dam-dyke across the whole bed of the Doon, up to the bank belonging to the pursuer, the pursuer asked the Court to find that the defenders were bound to construct a slap in the dam-dyke about the centre of the stream, sufficient to allow salmon to pass freely up and down, in terms of the Act 1696, c. 33.

After a long proof, the Lord Ordinary (KINLOCH), on 6th July 1864, found that from time immemorial there had been a mill on the defenders' lands; that to this mill there had always been attached a dam and dam-dyke; that the dam-dyke was originally built across the river from bank to bank, but occasionally fell into disrepair; that there had always been, to a greater or less extent, provision for the passage of salmon by a slap or otherwise; and that the defenders were entitled to maintain the dam-dyke from bank to bank, of its original height, but always with a sufficient slap.

The parties reclaimed; but, of consent, a remit was made to Mr Stevenson, C.E., to examine the dam-dyke, and to report as to the slap to be made, with reference to the Lord Ordinary's interlocutor and the reclaiming notes were abandoned.

Mr Stevenson reported he had "some difficulty in interpreting the Act of 1696, which provides that any slap shall not prejudice the going of the mill. But if a slap, however small, be formed in a dam, it must *pro tanto* prejudice the going of the mill, inasmuch as more water will go over the dam, and less water will go down the mill-lead than formerly. The only way of making a slap in a dam-dyke without prejudicing the going of the mill would be by raising the height of the dam along its whole extent, excepting at the part through which the fish are to pass, and which may perhaps be regarded as a slap; but the reporter does not see that the remit sanctions this view of the case, the more so as the effect of such a work would be, instead of prejudicing, to give, in many states of the river, a greatly increased supply of water to the mill, and a correspondingly decreased supply in the bed of the stream below the dam. Under these circumstances, the reporter supposes that the bottom of the slap is to be cut *below the level of the original crest of the dam;* and he is of opinion that a slap 4 feet in width and 12 inches in depth, in the centre, with a connecting salmon ladder, will be sufficieut for the passage of salmon" . . . . . .

The Lord Ordinary thereafter found that the defender was bound to construct and maintain in the centre of the dam-dyke a slap of 4 feet in width and 12 inches in depth in the centre, as recommended by the reporter, and appointed the defenders to construct such a slap. The defender having reclaimed and asked the Court to find that the slap must be one which, in terms of the Act 1696, c. 33, should not prejudge the going of the mill, or interfere with the use of the water had by the defenders prior to June 1859, the Inner House remitted of new to Mr Stevenson to report—1. Whether, having regard to the extent of the use of the water prescriptively had by the defenders and their predecessors prior to June 1859, the arrangement proposed by him would be materially prejudicial to the efficient working of the mill; 2. If damage would result, whether by raising the lower portions of the dam-dyke to the level of the higher portions, and leaving a slap, or by some other means, the passage of salmon could be sccured without material prejudice to the efficient working of the mill.

Mr Stevenson again reported—"The proposed lowering, in so far as my inspections of the river enable me to form a judgment, would not, in the ordinary state of the river, materially prejudice the going of the mill in the present state of matters, but it would materially prejudice the going of the mill whenever the water sank, for example, so low as not to pass over the crest of the dam. . . . . The above opinion, however, is given irrespective of the prescriptive use of water by the defenders prior to June 1859. . . . . If that prescriptive right is the same as laid down by the Lord Ordinary, viz., that the dam, as it stands at present, requires a slap or lowering to be made in it in order to restore it to the state in which it was prior to June 1859, then I think that the slap proposed by me of 4 feet in width and 12 inches in depth in the centre—which in my opinion is not unnecessarily large—will not materially prejudice the mill, keeping in view the said prescriptive use of water."

Parties were heard on the report.

SOLICITOR-GENERAL MILLAR and A. MONCRIEFF for defender.

HORN and A. R. CLARK for pursuer.

LORD PRESIDENT—My Lords, this case has been more than once before this Division, but so far as I can see it has not been necessary till now for the Court to consider all the merits of the case; because, on the first occasion, the interlocutor of the Lord Ordinary, then under review, was of consent adhered to, with certain qualifications; and, on a subsequent occasion, a remit was made before answer to Mr Stevenson to make an additional report. We are now therefore to consider the whole case on its merits, so far as this is not disposed of by the final interlocutor of the Lord Ordinary of 6th July 1864.

The Marquis of Ailsa is proprietor of a considerable estate or barony lying on the banks of the Doon; and the defenders are the owner and tenant of the lands of Monkwood and a mill thereon, which lies on one bank of the Doon, the opposite bank being within the estate of the Marquis of Ailsa, the Marquis being also proprietor of the fishings in the Doon, both above and below the lands of Monkwood. The mill of Monkwood has been supplied with water by means of a dam-dyke and mill-lade which have existed for a very long time, and to which the proprietor of Monkwood has acquired a prescriptive right. Without that previous right, of course, the proprietor of Monkwood would not have been entitled to erect any dam in the river between his property and the property of the Marquis on the opposite bank; but he has acquired that right, and the extent of that right is, of course, as in all such cases, to be measured by the extent of possession. *Tantum*

prescriptum quantum possessum. The interest of the Marquis as proprietor of the opposite bank of the stream is to prevent the owner of Monkwood from increasing or otherwise altering the embankment to which he has thus acquired right, in prejudice of the rights of the Marquis as proprietor of the opposite bank. It is clear in law that, as proprietor of the opposite bank, he is entitled to prevent the proprietor of Monkwood from raising his embankment any higher than it has been during the prescriptive period. But the interest of the Marquis does not end there, for being proprietor of the fishings above as well as below, he is entitled to have the necessary means which the law provides for the passage of salmon provided and constantly maintained, and that right is asserted under the conclusions of the summons.

Such being the relative rights of parties, the leading conclusions of the action were disposed of by the Lord Ordinary's interlocutor of 6th July 1864, and nothing was left to be disposed of but the mere arrangement to be made for securing and facilitating the passage of salmon up and down through the embankment. The Lord Ordinary found that there had been from time immemorial a mill on Monkwood, to which was attached a dam and dam-dyke; that the dam-dyke was at first built from bank to bank, but was occasionally in disrepair; that there had always been provision for the passage of salmon by slap or otherwise; and that the defender was entitled to a dam-dyke across the river of its original height. At the time when this interlocutor was pronounced the original height was matter of dispute, but it is now admitted that the existing height is substantially the original height, and is to be taken as such in disposing of the case. Taking the interlocutor and admission together, it seems to me to establish this state of facts and right—that the proprietor of Monkwood, in respect of prescriptive possession, is entitled to have a dam-dyke maintained of the present existing height; but that, in conformity with all past possession had by him during the prescriptive period of possession, provision must be made for the free passage of salmon by slap or otherwise. But there is another part of the Lord Ordinary's interlocutor to be attended to, for his Lordship has said that there must be constantly in the dam-dyke a slap or lowering of height for a certain space for the purpose of facilitating the passage of salmon in the said river. Now, that finding was qualified and explained by a joint-minute by the parties when the case was before the Court under a reclaiming note. The explanation is this, that the slap in the dam-dyke, for which provision was made by the fifth finding of the Lord Ordinary's interlocutor, was a slap the formation of which was to be regulated by the Act 1696, c. 33, as contended for in the tenth conclusion of the summons, regard being had to the extent of the use of the water prescriptively had by the defenders and their predecessors to June 1859. It would appear to me perfectly clear, under the terms of the Lord Ordinary's interlocutor, that he meant to provide a slap under the Act 1696, c. 33; but then the words added, "regard being had," &c., are also material, because showing that this application of the Act 1696 is not to be made irrespective of the mode in which the right to the dam-dyke has been acquired, but, on the contrary, it is to be kept in view in applying the statute that the dam-dyke is to be of the precise formation as settled by the interlocutor of the Lord Ordinary in the earlier part. That interlocutor was adhered to, and his Lordship then seemed to think that all that remained to be done was to have the slap made in conformity with his Lordship's judgment, as explained by the joint minute. And, accordingly, he made a remit to Mr Stevenson to examine the dam-dyke and report as to the slap to be made, having reference to the interlocutor of July 1864. In obedience to that interlocutor Mr Stevenson reported, but he seems to have been in some difficulty in understanding the position of the case as it then stood, and also in understanding the Act 1696, c. 33, for he says it is impossible to make any slap which shall not prejudice the mill, and the only way that can be done is by raising the height of the dam along the whole extent, except the part through which the fish are to pass. But the reporter says that he does not see that the remit sanctions this view of the case—[*reads*]. This last view is adopted by the Lord Ordinary, on consideration of the report. He thought that making a slap by heightening the dam-dyke was not a proper application of the statute to this case. If you erect a dam-dyke for the first time on the ground of a party entitled to erect it, you may make it of any height you please, if you do not regorge the water on the upper proprietor, or fail to return it before the stream leaves your own estate. All that the statute requires is a slap for the passage of salmon. Again, where there is an existing dam-dyke, all within the lands of one proprietor, he may raise the height of it; but the peculiarity here is, that the right is a limited right as regards the height of the dam-dyke, and that being the whole extent of the right of the defender, it seems to me that this idea of making a slap by raising the height of the dam-dyke is out of the case; and the Lord Ordinary was right in the other view, that the slap is to be made in the existing dam-dyke by lowering a part. The only question therefore was, how this was to be done, doing as little damage as possible to the mill by the abstraction of water. The interlocutor under review finds that the defender is bound to construct and maintain a slap 4 feet in width and 12 inches in depth in the centre, as recommended by Mr Stevenson, and appoints the defender to construct such slap at sight and to the satisfaction of Mr Stevenson. The defender reclaimed; and when the case came here there seems to have been some discussion, the result of which was, that there was a second remit to Mr Stevenson. The leading question put to him was, Whether, having regard to the extent of the use of the water prescriptively had by the defenders prior to 1859, the proposed arrangement would be materially prejudicial to the efficient working of the mill? According to my view, it is unnecessary to read the other questions put to him, for they are alternatives to the first question, and the way in which Mr Stevenson has answered the first question is sufficient for us in disposing of the case. The view which I understand your Lordships took in making this remit was, that in fixing the nature and dimensions of the slap it was important to avoid any material prejudice to the working of the mill. But then there was always this qualification, that it must be a material prejudice to the working of the mill, having regard to the use of the water had by the defender; and Mr Stevenson's report in answer to that is quite clear. He says that the lowering would not be of material prejudice in ordinary circumstances, &c.—[*reads from second report*]. That answer is made irrespective of any regard to the

use of the water prescriptively had by the defender; and he goes on to say that if that prescriptive right is the same as that laid down by the Lord Ordinary, as we must hold it to be, viz., that the dam as it stands at present requires a slap to be made in it to restore it to its previous state; then he thinks that the slap he proposed—4 inches wide and 12 deep—would not materially prejudice the mill, keeping in view the said prescriptive use of water. I think, therefore, that this second report completes and confirms the interlocutor of the Lord Ordinary, and the soundness of the result at which he had arrived before that remit was made; and removes any doubt which might have suggested itself as to the possibility of inflicting, by enforcing the pursuers' rights, a material injury on the efficient working of the mill. I think this is the sound legal result of the whole facts and evidence in the case, but I think it is also a practically just result; because it is quite obvious to me that when this slap shall have been made under the supervision of Mr Stevenson, the owner and tenant of the mill will have as much water, and have their mill as efficient as during the prescriptive period; because it is clear that though the height of the dam was such as it is now, taking it generally, it never extended throughout the whole length through any important period of time, but occasionally, as the Lord Ordinary says, fell into disrepair; and though the slap may have been sometimes occasioned by mere disrepair, it was always such as to facilitate the passage of salmon, and was sufficient for that purpose. Now, Mr Stevenson says that the slap he recommends is not unnecessarily large. In adhering to the Lord Ordinary's interlocutor we are giving full effect to the right created in the person of the proprietors of Monkwood by prescriptive possession. I propose that we adhere to the judgment of the Lord Ordinary, and as all that is to be done is to get the work executed, that we should direct Mr Stevenson to report to us.

Lord Curriehill concurred, and said that the case might be stated in three propositions:—1. The defenders had established a right to a dam by prescription, and were entitled to have it maintained at common law. 2. By the Act 1696, c. 33, the owner of the salmon fishing in that character was entitled to have a slap in that dam-dyke, provided it did not "prejudge the going of the mill." 3. The question came to be, as matter of fact, whether what was now proposed would prejudge the mill. The owner of the mill must show how it would prejudge the mill. The defenders' counsel had admitted that there was no proof by the owner that the proposed slap would prejudge the mill. There was another opportunity of proving that it would do so by the report of Mr Stevenson, but, as his Lordship read that report, it did not appear that there would be any prejudice, at least any greater than had always been experienced.

Lord Deas concurred.

Lord Ardmillan—It is to be regretted that there should have been so much litigation in this matter. There is only one part of the case as to which I have any difficulty, and that difficulty does not make me dissent from your Lordships' judgment. 1. There is no doubt that the contention of the Marquis of Ailsa, that the dam-dyke was not legally placed from bank to bank, is ill founded, and that the defender has established a prescriptive right to a dam-dyke so extending. 2. There is as little doubt that the Marquis is entitled under the Act 1696 to have a slap in that dyke for the passage of salmon. 3. The right of the Marquis to have that slap is qualified by the necessary statutory condition that the slap shall not prejudge the going of the mill. These facts being ascertained, the only point of difficulty is in the question as to the extent and depth of this slap. The Act was for the benefit of salmon proprietors, to give them a right to secure the passage of salmon, but that right was qualified by the obligation not to make such a slap as would prejudge the going of the mill. Now, the prescriptive right acquired by Paterson is, I think, to be considered apart from the effect of accidental disrepair. I think that the dam from bank to bank, and the right to make and maintain it which has been acquired by prescription, is to be viewed without regard to the accidental disrepair of that dam, for the party who has a right to put that dam there, has a right to maintain it efficiently; and so reading the evidence, I have some doubt whether, in giving effect to the amount of prescriptive possession of the water, we are not leaving a little out of view the state of disrepair of this dam. I don't go into the evidence. The Solicitor-General admitted that there was no evidence that the slap would prejudge the mill; but the report of Mr Stevenson says that the proposed slap would not in the ordinary case prejudge the mill, but it would, whenever the water sunk so low as not to pass over the crest of the dam. Now when there is plenty of water there is no difficulty, for then the salmon can pass easily, and the mill work easily, but it would be otherwise, Mr Stevenson thinks, when the water is low. No doubt that opinion is qualified by a reference to the prescriptive possession of the water. My doubt is, that that fact has been overlooked. The result of my opinion would be, that a slap somewhat less deep than that proposed by Mr Stevenson would meet the case.

Adhere.

Agents for Pursuer—Hunter, Blair, & Cowan, W.S.

Agents for Defender—M'Ewan & Carment, S.S.C.

Wednesday, November 6.

WILL *v.* ELDER'S TRUSTEES.

Adjudication—Co-obligant—Assignation—Property. Heritable property, belonging to several parties jointly, was adjudged for their joint debt. *Held* that one of the co-obligants was not entitled, on tendering payment of the whole balance due, to obtain from the creditor an assignation of the security in so far as it included the shares of the property belonging to the co-obligants other than himself.

The pursuer in this action was John Will, Broughty-Ferry, and the defenders were the trustees of the late David Elder, flesher there. It appeared that the pursuer and his brothers and sisters were joint owners, in certain proportions, of certain property in Broughty-Ferry. In 1844 David Elder advanced money for behoof of these parties, and in 1852 he obtained decrees of constitution against them, jointly and severally, for the amount due. Thereafter he obtained decree of adjudication, adjudging the whole subjects in security of the